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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. LORIE DEANN JONES, Defendant and Appellant.	C059708 (Super. Ct. No. 07F8334)

After the jury heard evidence that defendant Lorie Deann Jones, a former Hallmark store employee, processed false merchandise returns, it found her guilty of five counts of petty theft (Pen. Code, §§ 484, 488; undesignated statutory references are to the Penal Code) and five counts of identity theft (§ 530.5, subd. (a)). Defendant thereafter admitted a prior theft conviction, thereby elevating each petty theft charge to a conviction for petty theft with a prior, a felony. (§ 666.)

Defendant was sentenced to state prison for six years eight months, consisting of three years on count 1, the first identity theft charge, plus an enhancement of one year for a prior prison

term; eight months each (one-third the midterm), to be served consecutively, on each of the remaining four identity theft counts; and eight months each (one-third the midterm) on each of the five counts of petty theft with a prior, to be served concurrently.

On appeal, defendant contends that--except for the sentence imposed in count 1--the sentences imposed on the remaining nine convictions should have been stayed pursuant to section 654.

We agree only that the sentences on defendant's petty theft convictions should have been stayed by operation of section 654. We shall order the sentences on those convictions stayed and shall otherwise affirm the judgment.

BACKGROUND

In February 2006, when these crimes occurred, defendant was working as an assistant manager of a Hallmark store in Redding.

The store manager testified at trial that each store employee has a unique identification number he or she must use to log into a computerized cash register before completing a sale. The register records on a receipt the employee's identification number, as well as the date and time of the transaction. A customer making a return ordinarily fills out a form with his or her name, phone number, and signature.

Counts 1 and 2: Return in the name of Helen Tompkins

On February 21, 2006, defendant rang up a return for $32.14 in cash for three scarves. The return form bears Helen Tompkins' name, as well as her telephone number and her purported signature.

At trial, Edward Tompkins testified that his wife, Helen, died in 2004, two years before the purported transaction at issue here. The telephone number on the return form had been hers, but the signature was not.

Counts 3 and 4: Return in the name of Marta Baba

On February 20, 2006, defendant rang up a cash return for merchandise of $96.53. The return form bears the name Marta "Babba," as well as her telephone number and her purported signature.

At trial, Marta Baba testified she had never shopped in the Hallmark store during 2006 and did not make the purchase attributed to her by the return form. Moreover, her name is misspelled on the return form; the telephone number is correct, but the signature is not hers.

Counts 5 and 6: Return in the name of Jennifer Amato

On February 21, 2006, six minutes after the return attributed to Helen Tompkins, defendant rang up a cash return of $82.57 for an art panel. The return form bears the name Jennifer Amato, a telephone number and her purported signature.

At trial, Jennifer Noullett (née Amato) testified she had never made any returns to the Hallmark store, and the signature and telephone number on the return form are not hers.

Counts 7 and 8: Returns in the name of Beth Smith

On February 5, 2006, defendant processed a cash return of $8.02 for two ornaments. The return form bears the name, telephone number, and purported signature of Beth Smith.

That same afternoon, defendant processed another cash return of $15.52 by Beth Smith. Two of the ornaments included on the return receipt were the same as those included in the $8.02 cash return also processed that day.

Beth Smith testified at trial that her name and telephone number appear correctly on both return forms, but the handwriting and signature are not hers.

Counts 9 and 10: Return in the name of Shirley Lawrence

On February 27, 2006, defendant processed a cash refund of $22.52. The return form bears the name, telephone number, and purported signature of "Shirly" Lawrence.

At trial, Shirley Lawrence testified she had never made any returns to the Hallmark store. The telephone number on the return form was hers, but the signature (in which her first name was misspelled) was not.

Following a police investigation, defendant was charged with five counts of petty theft and five counts of identity theft, and it was alleged she had served a prior prison term.

At trial, the prosecution offered evidence of three other uncharged return transactions processed by defendant:

--Four minutes after the Tompkins return, defendant rang up a cash return for $58.98. The return form identified Robert Simms as the customer, and included a signature and telephone number. The police searched public records and were unable to identify anyone with that name and telephone number.

--On February 6, 2006, defendant rang up a cash return for $53.61. The return form identified Ann Fergesen as the

customer, and included a signature and telephone number, but the police were unable to contact anyone with that name and telephone number.

--On February 10, 2006, defendant rang up a cash return in the amount of $53.61. The return form identified Mary Rogers as the customer, and included a signature and telephone number, but the police were unable to contact anyone with that name and telephone number.

The prosecution also introduced evidence that, five years before these crimes, defendant admitted using a credit card belonging to a former employer, forging the cardholder's signature, and making more than $5,000 in unauthorized purchases.

Defendant testified and admitted three prior convictions for grand theft. She denied fraudulently writing the names of the identity theft victims in this case on any return form and denied ever taking money from the register.

The jury found her guilty on all counts.

DISCUSSION

I. *The Trial Court Did Not Err in Declining to Aggregate the Identity Theft Counts*

At sentencing, defendant argued all of the thefts were part of a single common plan subsumed in the first count, and urged the court to stay punishment on the remaining counts pursuant to section 654. The court declined, and found the thefts were not part of a continuous course of conduct.

On appeal, defendant renews her contention that because "all of the offenses had a single purpose, intention, and victim," the trial court violated section 654 by sentencing her separately on each identity theft and petty theft count.

For the reasons that follow, we conclude section 654 barred separate punishment for the petty theft convictions, but not for the identity theft convictions.

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Although section 654 literally applies only where multiple statutory violations arise out of a single 'act or omission,' it has also long been applied to cases where a 'course of conduct' violates several statutes. [Citations.] A 'course of conduct' may be considered a single act within the meaning of section 654 and therefore be punishable only once, or it may constitute a 'divisible transaction' which may be punished under more than one statute. [Citations.] Whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is a question of fact for the trial court, and the trial court's findings will not be disturbed on appeal if they are supported by substantial evidence. [Citations.]" (*People v. Kwok* (1998)

63 Cal.App.4th 1236, 1252-1253 (*Kwok*), citing *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

"In what has been characterized as a 'judicial gloss' on the language of section 654 [citations], the basic test used for determining whether a 'course of conduct' is divisible was stated in *Neal* as follows: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*Kwok, supra*, 63 Cal.App.4th at p. 1253.)

"[D]ecisions since *Neal* have refined and limited application of the 'one intent and objective' test, in part because of concerns that the test often defeats its own purpose because it does not necessarily ensure that a defendant's punishment will be commensurate with his culpability. [Citation.] For example, in *People v. Beamon*[(1973)] 8 Cal.3d [625,] 639, the Supreme Court stated that protection against multiple punishment under section 654 applies to 'a course of conduct deemed to be *indivisible in time*.' (Italics added [by *Kwok*].) The court added in a footnote: 'It seems clear that a course of conduct *divisible in time*, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citation.] Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course

of conduct' for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately." (*Kwok*, *supra*, 63 Cal.App.4th at p. 1253 and cases cited therein.)

In light of the above, section 654 did not bar separate punishment for defendant's convictions on each of the five identity theft convictions--counts 1, 3, 5, 7, and 9. Each had a separate victim and a separate objective, i.e., the successful creation of a fictitious return customer whose identity could be used to steal money. And these instances of identity theft were divisible in time: even the two that occurred on the same day, counts 1 and 5, occurred minutes apart, not simultaneously.

Arguing to the contrary, defendant relies on two cases, *People v. Packard* (1982) 131 Cal.App.3d 622 (*Packard*) and *People v. Kronemyer* (1987) 189 Cal.App.3d 314 (*Kronemyer*), for the proposition that where multiple takings are motivated by a single intention and plan, they constitute a single crime.

The single-intent-and-plan doctrine was articulated in *People v. Bailey* (1961) 55 Cal.2d 514, 518–519 (*Bailey*), in which our Supreme Court concluded that it was appropriate to consolidate several petty thefts into a single conviction for grand theft because the individual takings were part of a single plan. In that case, the defendant was found guilty of grand theft for unlawfully taking multiple county welfare payments, for which she was ineligible, over an 18-month period. (*Bailey, supra,* 55 Cal.2d at pp. 515-516.) The issue before the court was whether the defendant was guilty of grand theft or a series

of petty thefts, as none of the individual payments was greater than $200, but the aggregate payments exceeded that sum. (*Id.* at p. 518.) The court in *Bailey* explained that the test as to whether separate offenses were committed is whether one general intent or separate and distinct intents were established by the evidence. (*Id.* at p. 519.) It noted that this determination depends on the facts of each case, and that a defendant may be convicted of separate counts charging grand theft from the same person "if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Ibid.*; accord, *People v. Zanoletti* (2009) 173 Cal.App.4th 547, 559 (*Zanoletti*).)

As defendant acknowledges, *Bailey* and its progeny, including *Packard, supra*, 131 Cal.App.3d at page 626 and *Kronemyer, supra,* 189 Cal.App.3d at pages 363-364 are distinguishable because they were not concerned with the correct application of section 654. Rather, these cases addressed the question of whether a series of thefts committed over a period of time should be aggregated into one offense. (See also *Kwok*, *supra*, 63 Cal.App.4th at pp. 1254-1255.)

Moreover, this court has held that the single-intent-and-plan doctrine of *Bailey* does not apply to the crime of identity theft. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455-457 (*Mitchell*).) The court reasoned that "[i]n order to violate section 530.5, subdivision (a), a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. [Citation.] Thus, it is the use of

the identifying information for an unlawful purpose that completes the crime and *each separate use constitutes a new crime*." (*Id.* at p. 455, italics added; cf. *Zanoletti*, *supra*, 173 Cal.App.4th at p. 560 [declining to apply *Bailey* doctrine to crime of insurance fraud]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866, disapproved on another ground in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8.) [declining to apply *Bailey* doctrine to crime of forgery].) For these reasons, we conclude the trial court did not err in determining that defendant's use of personal identifying information from five separate individuals to unlawfully obtain cash from the Hallmark store constituted separate crimes that could be separately punished.

II. *The Trial Court Erred in Declining to Stay Defendant's Petty Theft Convictions*

The trial court should have stayed punishment on defendant's petty theft convictions in counts 2, 4, 6, 8, and 10 instead of imposing concurrent sentences. As we explained above, the crime of identity theft has two elements: "(1) obtain[ing] personal identifying information, and (2) us[ing] that information for an unlawful purpose." (*Mitchell, supra,* 164 Cal.App.4th at p. 455.) When defendant used the personal information from each identity theft victim to steal money from the Hallmark store, she completed both the crime of identity theft and (given the amounts stolen) petty theft. Each petty theft count was accomplished by the same ultimate act, and shared the same intent, the crime of

petty theft, as its corresponding identity theft. As to each completed taking from the Hallmark store, only one crime can be punished.

The trial court therefore erred under section 654 in imposing concurrent terms rather than staying the punishment for the petty thefts in counts 2, 4, 6, 8, and 10. We will direct that the abstract of judgment be amended accordingly.

DISPOSITION

The judgment is amended to stay the sentences imposed on counts 2, 4, 6, 8, and 10 pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SIMS, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.